(22,311)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 131.

MARY F. BUTTS, PLAINTIFF IN ERROR,

vs.

MERCHANTS AND MINERS TRANSPORTATION COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1912.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Mary F. Butts, Plaintiff and Merchants and Miners Transportation Company, Defendant a manifest error hath happened, to the great damage of the said Mary F. Butts as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do comamnd you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the third day of September next, in the Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan Associate Justice of the United States, the sixth day of August, in the year of our Lord one thousand nine hundred and ten.

WILLIAM NELSON,
Deputy Clerk of the District Court of the United States, District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

2 *Return of District Court on Writ of Error.*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I William Nelson, Deputy Clerk of said District Court of the United States, in and for the District of Massa-

chusetts, have hereto set my hand and the seal of said Court this seventeenth day of August A. D. 1910.

[Seal of the District Court, Massachusetts.]

WILLIAM NELSON,
Deputy Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a District Court of the United States Begun and Holden at Boston, within and for the District of Massachusetts, on the Third Tuesday (Being the Sixteenth Day) of March, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Before the Honorable Frederic Dodge, Judge.

No. 155.

MARY F. BUTTS, Plaintiff,
versus
MERCHANTS AND MINERS TRANSPORTATION COMPANY, Defendant.

Writ.

MASSACHUSETTS DISTRICT, *ss:*

[SEAL.]

The President of the United States of America to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Merchants and Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland, having a usual place of business in Boston in our District of Massachusetts, to the value of fifteen thousand dollars, and summon the said corporation (if it may be found in your District,) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the first Tuesday of December next.

Then and there, in our said Court, to answer unto Mary F. Butts of Everett in said District In an action of Contract.

4 To the damage of the said Mary F. Butts (as she says) the sum of fifteen thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, The Honorable Frederic Dodge, at Boston, the twenty-seventh day of August, in the year of our Lord one thousand nine hundred and eight.

WILLIAM NELSON,
Deputy Clerk.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *September* 22*nd*, 1908.

Pursuant hereunto I have this day at Boston attached a chip as the property of the within named defendant corporation, Merchants and Miners Transportation Company, and on the same day at Boston, I summoned the within named defendant corporation, Merchants and Miners Transportation Company to appear at Court and answer as herein directed by giving in hand to Wm. D. T. Trefry, Commissioner of Corporations for the Commonwealth of Massachusetts, a true and attested copy of this Writ with $2.00 his legal fee.

JAMES C. RUHL,
Deputy U. S. Marshal.

This cause was entered at the December Term, A. D. 1908, of this Court, and at the entry of said cause, the following Plaintiff's Declaration was filed.

Plaintiff's Declaration.

December 1, 1908.

First Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which at said time was a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas to Norfolk in the State of Virginia.

And the Plaintiff further says that afterwards upon said
5 date the Defendant received her as a first class passenger by virtue of said ticket for transportation from said Boston to said Norfolk by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the steamship "Juniata", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, on said June 29, 1907, during said voyage, upon the high seas, because of her color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her said ticket and paid for by her, of eating her supper at the first table with the white passengers who had first class tickets, but compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second

table with those who had second class tickets, and use table linen which was soiled by previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served for this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Second Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at said time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas to Norfolk in the State of Virginia.

And the Plaintiff further says that afterwards upon said date the Defendant received her by virtue of said ticket as a first class passenger for transportation from said Boston to said Norfolk by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Juinata", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

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And the Plaintiff further says that upon said vessel, during said voyage on July 1, 1907, upon the high seas, more than a marine league from any land, while said vessel was within the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her breakfast at the first table with the white passengers who had first class tickets, but compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had second class tickets, and use table linen which was soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served for this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Third Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at said time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas to Norfolk in the State of Virginia.

And the Plaintiff further says that afterwards upon said date the Defendant received her by virtue of said ticket as a first class passen-

ger for transportation from said Boston to said Norfolk by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Juniata", a vessel owned by the Defendant and
7 duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during said voyage, on July 1, 1907, upon the high seas, more than a marine league from any land, while said vessel was within the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility and privilege, included in her ticket and paid for by her, of eating her dinner at the first table with the white passengers who had first class tickets, but compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had second class tickets, and use table linen which was soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served to this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114, the Defendant owes the Plaintiff the sum of five hundred dollars.

Fourth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia upon and over the Atlantic Ocean and other parts of the high seas to Boston in the Commonwealth of Massachusetts.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her by virtue of said ticket as a first class passenger for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coast-
8 ing trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during said voyage, on August 28, 1907, upon the high seas, more than a marine league from any land, while said vessel was within the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her supper at the first table with the white passengers who had first class tickets, but compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had

second class tickets, and use table linen which was soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served to this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Fifth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia upon and over the Atlantic Ocean and other parts of the high seas to Boston in the Commonwealth of Massachusetts.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her by virtue of the said ticket as a first class passenger for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Stat-
9 utes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during said voyage, on August 29, 1907, upon the high seas, more than a marine league from any land, while said vessel was under the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her breakfast at the first class table with the white passengers who had first class tickets, and compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had second class tickets, and use table linen which was soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served by this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114, the Defendant owes the Plaintiff the sum of five hundred dollars.

Sixth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia to Boston in the Commonwealth of Massachusetts, upon and over the Atlantic Ocean and other parts of the high seas.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her by virtue of the said ticket as a first class

passenger for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used
10 by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during said voyage, on August 29, 1907, upon the high seas, more than a marine league from any land, while the said vessel was under the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her dinner at the first table with the white passengers who had first class tickets, and compelled this Plaintiff to wait until the white first class passengers had finished and use table linen which was soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served to this Plaintiff.

Wherefore under the provisions of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Seventh Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia upon and over the Atlantic Ocean and other parts of the high seas to Boston in the Commonwealth of Massachusetts.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her by virtue of the said ticket as a first class passenger for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during
11 said voyage, on August 29, 1907, upon the high seas, more than a marine league from any land, while the said vessel was under the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her supper at the first table with the white passengers who had first class tickets, and compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had second class tickets, and to use table

linen which had been soiled by the previous use by those admitted to the first table and to use dishes which were used at the first table and were not washed after such use and before being served to this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Eighth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which was at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia upon and over the Atlantic Ocean and other parts of the high seas to Boston in the Commonwealth of Massachusetts.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her by virtue of the said ticket as a first class passenger for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, during said voyage, on August 30, 1907, upon the high seas, more than a marine league from any land, while the said vessel was within the ex-
12 clusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant denied her the accommodation, advantage, facility, and privilege, included in her ticket and paid for by her, of eating her breakfast at the first table with the white passengers who had first class tickets, and compelled this Plaintiff to wait until the white first class passengers had finished and to eat at the second table with those who had second class tickets and to use table linen which had been soiled by the previous use by those admitted to the first table and to use dishes which had been used at the first table and were not washed after such use and before being served to this Plaintiff.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Ninth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which at said time was a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Boston in the Commonwealth of Massachusetts to Norfolk in the State of Virginia, upon and over the Atlantic Ocean and other parts of the high seas.

And the Plaintiff further says that afterwards upon said date the

Defendant received her as a first class passenger by virtue of said ticket for transportation from said Boston to said Norfolk by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Juniata", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff further says that upon said vessel, on said June 29, 1907, and throughout the said voyage, the Defendant denied the Plaintiff, because of her color, the accommodation, advantage,
13 facility, and privilege of having a state-room upon the upper deck, although the Plaintiff held a first class ticket entitling her to such a state-room, and compelled this Plaintiff to occupy a state-room upon the lower deck which state-room was much less pleasant than the upper room and rendered the Plaintiff more liable to sea-sickness on account of the motion of the part of the vessel. And the Plaintiff says that this discrimination took place upon the high seas, and upon a part of the high seas more than a marine league from any land, and upon said vessel while it was within the exclusive jurisdiction of the United States.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Tenth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which at said time was a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia upon and over the Atlantic Ocean and other parts of the high seas to Boston in the Commonwealth of Massachusetts.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her as a first class passenger by virtue of said ticket for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff says that on said vessel, upon said August 28, 1907, and throughout the said voyage, upon the high seas, and upon a part of the high seas more than a marine league from any land, and while the said vessel was within the exclusive jurisdiction of the United States, because of this Plaintiff's color, the Defendant
14 denied her the accommodation, advantage, facility, and privilege, of having a state-room upon the upper deck, although the Plaintiff held a first class ticket entitling her to such a state-

room, and compelled this Plaintiff to occupy a state-room upon the lower deck which state-room was much less pleasant than the upper room and rendered the Plaintiff more liable to sea-sickness on account of the motion of that part of the vessel.

Wherefore under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Eleventh Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant which at said time was a common carried by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas to Norfolk in the State of Virginia.

And the Plaintiff further says that afterwards upon said date the Defendant received her as a first class passenger by virtue of said ticket for transportation from said Boston to said Norfolk by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Juniata", a vessel owned by the Defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as a common carrier by water between the said ports.

And the Plaintiff says that upon said vessel and during said voyage the Defendant denied the Plaintiff because of her color the privilege of eating with the first class passengers, which privilege was included in her said ticket and had been paid for by her, and compelled this Plaintiff to eat with the second class passengers. This discrimination took place upon a part of the high seas more than a marine league from any land and while the said vessel was within the exclusive jurisdiction of the United States, and elsewhere upon the high
15 seas, throughout the course of said voyage.

Wherefore the Plaintiff says that the Defendant under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 the Defendant owes the Plaintiff the sum of five hundred dollars.

Twelfth Count. And the Plaintiff says that she is a colored person and a citizen of the United States and that on or about June 29, 1907, she purchased of the Defendant at that time a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage from Norfolk in the State of Virginia to Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas.

And the Plaintiff says that afterwards upon August 28, 1907, the Defendant received her as a first class passenger by virtue of said ticket for transportation from said Norfolk to said Boston by way of said Atlantic Ocean and other parts of the high seas as aforesaid upon the Steamship "Howard", a vessel owned by the Defendant and duly

enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the Defendant in carrying on its business as common carrier by water between the said ports.

And the Plaintiff says that upon said August 28, 1907, and throughout said voyage, the Defendant because of the Plaintiff's color denied her the privilege of eating with the first class passengers, which privilege was included in her said ticket and had been paid for by her, and compelled this Plaintiff to eat with the second class passengers. This discrimination took place upon a part of the high seas more than a marine league from any land and while said vessel was within the exclusive jurisdiction of the United States, and elsewhere upon the high seas.

Wherefore the Defendant under the provision of Section 2 of the Act of Congress of March 1, 1875, c. 114 owes the Plaintiff the sum of five hundred dollars.

By Her Attorney, ALBION L. RICHARDS.

16 On the eighth day of December, nineteen hundred and eight, the following Demurrer to Plaintiff's Declaration was filed.

Demurrer to Plaintiff's Declaration.

The Defendant in the above entitled action demurs to the Plaintiff's Declaration and to each and every count therein contained, and assigns the following causes of demurrer:

First. That the matters set out in the Plaintiff's Declaration are insufficient in law to enable the Plaintiff to maintain her action.

Second. That the Plaintiff seeks to recover in her said action penalties provided by Section 2 of chapter 114 of the Act of Congress of March 1, 1875, for the violation of Section 1 of said Act, and that both Sections 1 and 2 of said Act are unconstitutional and void, and the Defendant is therefore not liable for the penalties provided by Section 2 of said Act.

Third. That said Sections 1 and 2 of said Act of Congress of March 1, 1875, so far as they apply to common carriers transporting passengers by steamships from one state to another, are unconstitutional and void, and the Defendant is not liable for the penalties declared on in Plaintiff's Declaration.

Fourth. That said Sections 1 and 2 of said Act of Congress of March 1, 1875, do not apply to common carriers transporting passengers by steamships from one state to another, and therefore the Defendant is not liable for the penalties under Section 2 of said Act declared on in Plaintiff's Declaration.

Wherefore the Defendant prays judgment and that the Plaintiff may be barred from having or maintaining her aforesaid action against it.

MERCHANTS AND MINERS TRANSPORTATION CO.,

By Its Attorney, A. N. WILLIAMS.

I hereby certify that in my opinion there is such probable ground in law for the foregoing Demurrer as to make it a fit subject for judicial inquiry and trial, and that the same is not intended for delay.

A. N. WILLIAMS.

17 On the twenty-fourth day of December, nineteen hundred and eight, the following Defendant's Answer was filed.

Defendant's Answer.

And now comes the Defendant in the above entitled action, not waiving its Demurrer to the Plaintiff's Declaration heretofore filed in said cause, but wholly relying upon the same, and for Answer denies each and every allegation in the Plaintiff's Writ and Declaration contained.

And further answering the Defendant specially denies that the Defendant denied the Plaintiff any accommodation, advantage, facility, or privilege, which she was entitled to under her tickets, or either of them, because of her color, during either of the voyages mentioned in Plaintiff's Declaration; or that the Plaintiff was discriminated against in any manner because of her color.

And further answering the Defendant says that if the Plaintiff ate her meals, or any of them, during said voyage at the second table, it was not because of her color, but because the dining-rooms in the steamships upon which she took passage were not large enough to accommodate all the first class passengers at one sitting at the same time. And the Defendant further says that the second table was in every way equal to the first.

And further answering the Defendant specially denies that the Plaintiff by her tickets, or either of them, was entitled to a state-room on the upper deck on said steamships, or either of them, but the Defendant says that the state-rooms occupied by the Plaintiff were first class state-rooms and have always been so classed and used since said steamships have been built and in service.

MERCHANTS AND MINERS TRANSPORTATION CO.,
By Its Attorney, A. N. WILLIAMS.

From said December Term nineteen hundred and eight, this cause was continued to this present March Term. And now, on this twenty-first day of June, nineteen hundred and nine, the following Judgment is entered.

18 *Judgment.*

DODGE, *J.*: This cause entered at the December Term 1908 of this Court, came on to be heard on Demurrer to Plaintiff's Declaration on the twenty-seventh day of March, 1909, and now, to wit, June 21, 1909, the said Demurrer is sustained and it is considered by the Court that the Plaintiff, Mary F. Butts, take nothing by her Writ, and that

the said Defendant recover from the said Plaintiff its costs of suit taxed at —.

A true copy.

Attest:

WILLIAM NELSON,
Deputy Clerk.

19 District Court of the United States, District of Massachusetts.

No. 155. At Law.

MARY F. BUTTS, Plaintiff,
versus
MERCHANTS AND MINERS TRANSPORTATION COMPANY, Defendant.

On Demurrer to Plaintiff's Declaration.

Opinion.

May 17, 1909.

DODGE, *J.:*

The Declaration alleges twelve violations by the Defendant of the "Civil Rights Act" passed by Congress on March 1, 1875, (18 Stats. 335). The Plaintiff says she is a colored person, that she was a passenger on the Defendant's Steamship "Juniata", from Boston to Baltimore, during the summer of 1907, and a few weeks later was a passenger on the Defendant's Steamship "Howard", from Baltimore to Boston. On each of these trips, according to her allegations, she had a ticket entitling her to a first class passage, but on various occasions during each voyage the Defendant's servants, in control on board the Steamships, discriminated against her on account of her color, and denied to her for that reason the full and equal enjoyment of the accommodations, advantages, facilities and privilege- of the vessel.

If, as the Declaration alleges, the Steamships were public conveyances by water, and if the Plaintiff was discriminated against in the manner alleged while on board, she is within the language of Section 1 of the Statute and entitled to recover the penalties established by Section 2; unless as the Defendant sets up in its Demurrer, both Sections are unconstitutional and void. They were held unconstitutional and void, so far as the operation of the Act within any State is concerned, in the Civil Rights Cases, 109 U. S. 3, decided by the Supreme Court in October 1883. No action has ever been brought under them since that decision, so far as can be gathered from the reports.

20 The Court expressly refrained from deciding, in the Civil Rights Cases, whether the Act as it stands is operative in the Territories or in the District of Columbia. And the Plaintiff contends that the Sections referred to have never been held unconstitutional and void so far as their operation elsewhere than within the

limits of a State is concerned. It is urged on her behalf that they are constitutional and should be enforced where Congress has plenary jurisdiction, and that on board vessels of the United States, upon the high seas or upon the navigable waters of the United States, Congress has plenary if not exclusive jurisdiction. The Steamships named in the Declaration were, of course, while making the voyage there described, either on the high seas or on such navigable waters. But the Plaintiff's contention requires the Court to hold that no constitutional objection to Sections 1 and 2 exists if their operation be restricted to cases arising outside the limits of any State, and also to give them an operation thus restricted, by construction.

The objections to this method of dealing with the Statute are, in my opinion, too serious to be overcome. I am not prepared to say, the Supreme Court never having so decided, that the Sections of the Civil Rights Act in question would be valid as applied to the Territories or the District of Columbia. They stand as parts of a Statute which in its terms applies to all persons and all places within the jurisdiction of the United States. To hold them constitutional as applied to the Territories or to the District of Columbia it would be necessary to say that there are constitutional provisions in them which are capable of being separated from those provisions which the Supreme Court has declared unconstitutional. In order to give effect to provisions in a Statute which are constitutional by separating them from others which are unconstitutional, the one class must be separable from and not dependent upon the other, and it must also be plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. The Employers' Liability Cases 207 U. S. 463, 501. I am unable to believe that these conditions are here fulfilled. To a penal Statute moreover, such as this is, the rule applies that words of limitation are not to be inserted by the Court so as to make it specific, when as expressed it is general
21 only. U. S. vs. Reese 92 U. S. 214, 221. Baldwin vs. Franks, 120 U. S. 678. James vs. Bowman, 190 U. S. 197.

If it could even be called plain that Congress would have enacted these Sections of the Civil Rights Act as applying to the Territories and the District of Columbia, but not to cases arising within the States it can hardly be called equally plain that Congress would have enacted them as applying also on board vessels of the United States on the high seas. For while the Territories and the District "are subject to the plenary legislation of Congress in every branch of municipal regulation" (109 U. S. 19) a vessel of the United States on the high seas, being considered, for some purposes at least, as part of the State whereof her owner is a citizen, is subject, where Congress has not acted, to the legislation of that State in regard to the duties and liabilities of her owner. The Hamilton, 207 U. S. 398. If, as was decided in the Civil Rights Cases, the Fourteenth Amendment does not authorize direct legislation by Congress on the matters respecting which it prohibits the States from certain legislation or certain action,—but corrective legislation only, such as may be necessary or proper to counteract and redress the effect of forbidden State legislation or action,—it is, as it seems to me, the less easy to conclude

that Congress would have enacted direct legislation to apply where State legislation was in force, than that it would have enacted such legislation to apply in places subject to no legislation but its own.

If it be contended that Congress has power, under the commerce clause of the Constitution, to enact the Sections in question so far as they may apply to and regulate public conveyances in interstate commerce, such as the "Juniata" and "Howard" appear by the Declaration to have been; we are met, not only by the difficulty of restricting the operation of those Sections by construction to cases wherein it may be possible to construe them as regulations of interstate commerce, but also by the fact that the decision in the Civil Rights Cases declares that they "are not conceived in any such view," and that the question whether Congress might or might not pass a law regulating rights in such public conveyances was not, for that reason, before the Court in those cases. (109 U. S. 19.) If the Sections were not conceived in any such view, clearly they are not to be treated as regulations of interstate commerce for any purpose.

22 It is urged that these clauses in the opinion of the Supreme Court are dicta only, and that what is said in them has not the authority of a decision by the Court. It would appear from the dissenting opinion, (109 U. S. p. 60) that in one of the cases before the Court, the question whether or not the Sections could be maintained as applicable to commerce between the States, was directly involved. But whatever the force of the clauses referred to, I find nothing which I can regard as sufficient to justify this Court in adopting a view of the intent of Congress opposed to that which they express.

The Demurrer is sustained.

23 *Petition for Writ of Error.*

Filed August 5, 1910.

To the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts:

Respectfully represents Mary F. Butts of Boston in said District of Massachusetts, Petitioner for Writ of Error, against the Merchants and Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland and having a usual place of business in said Boston, as follows:

This Petitioner entered in the said District Court an action against the said corporation which is numbered 155 upon the docket of said Court and to the Plaintiff's Declaration in said action the said Defendant demurred because of the alleged unconstitutionality of the Statute upon which this Plaintiff based her action: which Demurrer was sustained by the Court, and judgment in said case was entered for the Defendant upon June 21, 1909, for the reason that the said Demurrer was sustained.

Wherefore this Petitioner, desiring to take the said case to the Supreme Court of the United States, respectfully prays that a Writ

of Error issue to bring up for review before the Supreme Court of the United States the said judgment and for such other relief as to this Honorable Court may seem meet.

MARY F. BUTTS.

24 *Assignment of Errors.*

Filed August 5, 1910.

And now comes Mary F. Butts, Plaintiff-in-error, and makes and files this, her Assignment of Errors.

1. The Honorable Justice of the District Court erred in sustaining the Demurrer of the Defendant, Merchants and Miners Transportation Company.

2. The Honorable Justice of the said Court erred in directing a judgment for the Defendant, upon said Demurrer.

3. The said Justice erred in ruling that the Act of Congress of March 1, 1875, (18 Stat. 335) was unconstitutional in its application to the facts of this case as stated in the Declaration.

4. The Honorable Justice of said court erred in ruling that the Defendant had the right to avail itself of the unconstitutionality of the said Statute in this case.

5. The Honorable District Court erred in sustaining the Defendant's Demurrer.

6. The Honorable District Court erred in giving judgment for the Defendant upon June 21, 1909.

7. The Honorable District Court erred in ruling that Congress did not intend the said Statute to apply in cases like the present, even if unconstitutional in other cases.

MARY F. BUTTS.

25 *Prayer for Reversal.*

Filed August 5, 1910.

To the Honorable the Supreme Court of the United States:

And now comes Mary F. Butts, Plaintiff in Error, and prays for a reversal of the judgment of the District Court of the United States for the District of Massachusetts in the action brought by Mary F. Butts, Plaintiff in Error, against the Merchants and Miners Transportation Company, Defendants and Defendants in Error, which was entered in the office of the Clerk of said Court upon June 21, 1909, and for the reversal of the order directing such judgment.

MARY F. BUTTS.

26 *Bond on Writ of Error.*

Filed August 5, 1910.

Know all Men by these Presents, That we, Mary F. Butts of Boston in the County of Suffolk and Commonwealth of Massachusetts, as principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York, having an office and usual place of business at said Boston, as sureties, are held and firmly bound unto Merchants and Miners Transportation Company in the full and just sum of two hundred and fifty dollars to be paid to the said Merchants and Miners Transportation Company, its successors, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of August in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between said Mary F. Butts as Plaintiff and the said Merchants and Miners Transportation Company, Defendant, case being numbered 155 on the docket of said Court, judgment was rendered against the said Mary F. Butts and the said Mary F. Butts having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Merchants and Miners Transportation Company citing and admonishing them to be and appear in the United States Supreme Court, in the city of Washington, District of Columbia, on the third day of September, A. D. 1910.

Now, the condition of the above obligation is such, That if the said Mary F. Butts shall prosecute her writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARY F. BUTTS. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]

[CORPORATE SEAL.]

By FRED L. ROBERTS,
Resident Vice President.

Attest:
JOHN N. DERRICK,
Resident Ass't Secretary.

Sealed and delivered in presence of
ALBIN L. RICHARDS,
To M. F. B.

Approved:
FREDERIC DODGE,
U. S. District Judge.

27 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Merchants and Miners Transportation Company, a corporation organized under the laws of the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, District of Columbia, on the third day of September next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein Mary F. Butts is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge Judge of the District Court of the United States for the District of Massachusetts, this sixth day of August, in the year of our Lord one thousand nine hundred and ten.

FREDERIC DODGE,
U. S. District Judge.

28 [Endorsed:] Marshal's No. 7910. U. S. Marshal's Office, P. O. Building, Boston, Mass., Aug. 15, 1910. Albin L. Richards, 53 State St., Boston, Mass.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *August* 15, 1910.

I hereby certify that on the fifteenth day of August, 1910, I served the within citation on the within-named defendant corporation "Merchants and Miners Transportation Company" by delivering to William D. T. Trefey Commissioner of Corporations for the Commonwealth of Massachusetts (the true and lawful attorney of said defendant corporation upon whom service of all lawful process against foreign corporations may be made in said Massachusetts District) at his office in said Boston, an attested copy of this precept with $2 allowed by law as his legal fee.

CHARLES A. BANCROFT,
Deputy U. S. Marshal.

Fees.

Service.....	2.00
Copy.....	.30
Travel.....	.12
P'd Com's.....	2.00
	$4.42

29 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Deputy Clerk of said Court, and during the temporary absence of the Clerk, in charge of the affairs of the Clerk's office, of said Court, and the custodian of its files and records, certify that the foregoing is a true copy of the record in case entitled, No. 155, Mary F. Butts, Plaintiff, vs. Merchants and Miners Transportation Company, Defendant, in said District Court determined; the Opinion of the District Court, the Petition for Writ of Error, the Assignment of Errors, the Prayer for Reversal, the Bond on Writ of Error, and also the original Citation issued upon the Writ of Error issued in said cause, with the officer's return of service thereon.

In testimony whereof, I hereunto set my hand, and affix the seal of said Court, at Boston, in said District, this seventeenth day of August, A. D. 1910.

[Seal of the District Court, Massachusetts.]

WILLIAM NELSON,
Deputy Clerk.

Endorsed on cover: File No. 22,311. Massachusetts D. C. U. S. Term No. 131. Mary F. Butts, plaintiff in error, vs. Merchants and Miners Transportation Company. Filed September 1st, 1910. File No. 22,311.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 131.

MARY F. BUTTS, PLAINTIFF IN ERROR,

vs.

MERCHANTS AND MINERS TRANSPORTATION COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This case is an action under Section 2 of the Act of Congress of March 1, 1875, c. 114, (commonly known as the Civil Rights Act) to recover penalties alleged to be due to the plaintiff. The defendant is a corporation organized under the laws of the State of Maryland. The declaration contains twelve counts. Every count alleges that the plaintiff is a colored person and a citizen of the United States, that on or about June 29, 1907, she purchased of the defendant which at said time was a common carrier by water between the ports and by the route hereinafter mentioned a first class ticket whereby she became entitled to a first class passage between Boston in the Commonwealth of Massachusetts upon and over the Atlantic Ocean and other parts of the high seas to Norfolk in the State of Virginia; that by virtue of the said ticket the defendant received her as a first class passenger upon one of its vessels plying between the said ports, said vessel being in every count alleged to be a vessel owned by the defendant and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes of the United States and being a public conveyance on water used by the defendant in carrying on its business as a common carrier by water between the said ports. Every count also alleges that during her said voyage in certain ways and in various places on account of her color, the defendant denied the plaintiff an accommodation, advantage, facility or privilege included in her ticket and paid for by her. The counts vary in describing different acts of discrimination alleged to have been done by the defendant in the

course of the plaintiff's journey from Boston to Norfolk, leaving Boston upon June 29, 1907, and from Norfolk to Boston, leaving Norfolk August 28, 1907.

Every count, except the first, alleges that the act of discrimination took place upon the vessel while she was upon the high seas, more than a marine league from any land, and under the exclusive jurisdiction of the United States. The first count simply alleges that the act of discrimination took place upon the vessel while she was upon the high seas.

The defendant filed a demurrer to the declaration. This demurrer was sustained by the District Court. In sustaining the demurrer the Court ruled that the section of the Civil Rights Act relied upon by the Plaintiff, because of the unconstitutionality of that statute, gave the plaintiff no right to recover in the present case. In the words of the opinion (record pages 13–14) the Court ruled as follows:

"And the Plaintiff contends that the Sections referred to have never been held unconstitutional and void so far as their operation elsewhere than within the limits of a State is concerned. It is urged on her behalf that they are constitutional and should be enforced where Congress has plenary jurisdiction, and that on board vessels of the United States, upon the high seas or upon the navigable waters of the United States, Congress has plenary if not exclusive jurisdiction. The Steamships named in the Declaration were, of course, while making the voyage there described, either on the high seas or on such navigable waters. But the Plaintiff's contention requires the Court to hold that no constitutional objection to Sections 1 and 2 exists if their operation be restricted to cases arising outside the limits of any State, and also to give them an operation thus restricted, by construction.

"The objections to this method of dealing with the Statute are, in my opinion, too serious to be overcome. I am not prepared to say, the Supreme Court never having so decided, that the Sections of the Civil Rights Act in question would be valid as applied to the Territories or the District of Columbia. They stand as parts of a Statute which in its terms applies to all persons and all places within the jurisdiction of the United States. To hold them constitutional as applied to the Territories or to the District of Columbia it would be necessary to say that there are constitutional provisions in them which are capable of being separated from those provisions which the Supreme Court has declared unconstitutional. In order to give effect to provisions in a Statute which are constitutional by

separating them from others which are unconstitutional, the one class must be separable from and not dependent upon the other, and it must also be plain the Congress would have enacted the legislation with the unconstitutional provisions eliminated. The Employers' Liability Cases, 207 U. S. 463, 501. I am unable to believe that these conditions are here fulfilled."

Judgment for the defendant was entered upon the demurrer.

The assignments of errors relied upon in this writ of error are as follows:

1. The Honorable Justice of the District Court erred in sustaining the Demurrer of the defendant, Merchants and Miners Transportation Company.

2. The Honorable Justice of the said Court erred in directing a judgment for the defendant upon said demurrer.

3. The said Justice erred in ruling that the Act of Congress of March 1, 1875, (18 Stat. 335) was unconstitutional in its application to the facts of this case as stated in the Declaration.

4. The Honorable Justice of said Court erred in ruling that the defendant had the right to avail itself of the unconstitutionality of the said Statute in this case.

6. The Honorable District Court erred in giving judgment for the defendant upon June 21, 1909.

7. The Honorable District Court erred in ruling that Congress did not intend the said Statute to apply in cases like the present even if unconstitutional in other cases.

From the ruling of the Court and the assignments of error the issue in this case is shown to be the following:—Does the unconstitutionality of Section 2 of the act of Congress of March 1, 1875, c. 114, render the statute of no effect upon a vessel, owned by a corporation organized under the laws of the state of Maryland, duly enrolled as a vessel of the United States engaged in the coasting trade upon an inter-state voyage upon the high seas and (as alleged in Counts 2 to 12 inclusive) more than a marine league from any land?

The contention of the plaintiff in error is that although the said statute is unconstitutional in its application to the states of the union, even in cases in which the application is a regulation of interstate commerce, yet in places in which Congress has plenary jurisdiction on all subjects of legislation (subject

only to the express limitations in the Constitution) such statute should have the force of law. It is contended that such places include not only the District of Columbia and the Territories, but also vessels upon the high seas, more than a marine league from any land, owned by a corporation organized under the laws of a state of the Union, and duly enrolled as a vessel of the United States engaged in the coasting trade in accordance with the provisions of the Revised Statutes. The plaintiff in error also maintains that the same is true with regard to such a vessel upon the high seas though she be within a marine league of land (Count 1).

Argument for Plaintiff in Error.

I. CONGRESS HAS TWO KINDS OF JURISDICTION, JURISDICTION DEPENDENT UPON LOCALITY AND JURISDICTION DEPENDENT UPON SUBJECT MATTER.

The jurisdiction of Congress may be divided into two classes: first, jurisdiction dependent upon locality, and second, jurisdiction dependent upon subject matter. An example of the first kind of jurisdiction, that dependent upon locality, is the jurisdiction of Congress over the District of Columbia. An example of the second, that dependent upon subject matter, is the jurisdiction of Congress over inter-state commerce. The jurisdiction of Congress over vessels of the United States upon the High Seas and the navigable waters of the United States, it is submitted, is jurisdiction of the first kind, dependent upon locality. "And yet altum mare is out of the jurisdiction of the common law and within the jurisdiction of the Lord Admiral." Co. Litt., s. 439.

The accepted view at the present time is that the admiralty and maritime jurisdiction of Congress is not dependent solely upon the power of regulating commerce. As was said by Mr. Justice Love in a case which like the present was an action to recover a penalty, "It is quite certain that the navigation laws of the United States are now framed upon the assumption of the plenary power of Congress over the subject of Navigation upon the waters of the United States without reference to the question of intra-state or inter-state commerce."

United States *vs.* Burlington & Henderson County Ferry, 21 Fed. 331, 341.

The general admiralty and maritime jurisdiction of Congress dependent upon and limited only by locality is derived from

the grant extending the judicial power "to all cases of admiralty and maritime jurisdiction" in article three, section two of the Constitution. As has been said by this Court "The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to all cases of admiralty and maritime Jurisdiction."

The Hamilton, 207 U. S. 398, 398.

See also the reference to this same doctrine in the same case on page 404 in which the Court says "The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts tends to establish . . ."

That fixing the limits of the admiralty and maritime jurisdiction is a matter of establishing a physical boundary appears from the various decisions dealing with the extent of the admiralty and maritime jurisdiction.

Gibbons *vs.* Ogden, 9 Wheat. 1.
Waring et al. *vs.* Clarke, 5 How. 441, 465.
The Genesee Chief, 12 How. 443.
Gilman *vs.* Philadelphia, 3 Wall. 724.
The Belfast, 7 Wall. 624.
The Daniel Ball, 10 Wall. 557.
Ex Parte Easton, 95 U. S. 68.
In Re Garnett, 141 U. S. 1.
The Robert W. Parsons, 191 U. S. 17.

From the group of decisions last cited the plaintiff-in-error calls attention particularly to the following citations with regard to the nature of the jurisdiction of Congress over the High Seas.

"The act of July 7, 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same state or different states." Mr. Justice Wayne in Waring et al. *vs.* Clarke, 5 How. 441, 465.

The distinction between acts regulating inter-state commerce upon land and the jurisdiction of Congress over the navigable waters of the United States was pointed out by Mr. Justice Field as follows:

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

"We answer, that the present case related to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

The Daniel Ball, 10 Wall. 557, 565–566.

"Public navigable waters, where inter-state or foreign commerce may be carried on, of course include the high seas, which comprehend, in the commercial sense, all tide-waters to high-water mark."

Ex Parte Easton, 95 U. S. 68, 72.

In the case of the Robert W. Parsons the admiralty jurisdiction was referred to as having its own law, "the law of the United States," in the following quotation:—

"So, too, in In re Garnett, 141 U. S. 1, the limited liability act was held to be a part of the law of the United States, enforceable upon navigable rivers above tide waters, and applicable to vessels engaged in commerce between ports in the same States."

The Robert W. Parsons, 191 U. S. 17.

The plaintiff in error suggests that the sovereignty of Congress over United States vessels upon the high seas is in nowise impaired by the fact that within that jurisdiction for some purposes, the laws of the individual states are given effect.

In the opinion of the Court below the case of the Hamilton, 207 U. S. 398, is cited as authority for the principle that a vessel of the United States on the high seas "being considered for some purposes at least as part of the state whereof her owner is a citizen is subject, where Congress has not acted, to the legislation of that State in regard to the duties and liabilities of her owner." It is respectfully submitted that the case cited did not in any way impugn the jurisdiction of Congress but merely decided that under the act of Congress providing proceedings for the limitation of liability of ship-owners, claims which a State had created against a corporation existing by the laws of that state should be recognized in the distribution of the fund. The

authority of the State to create the claim was based upon the personal allegiance to the State of the corporation against which the claim had been created and not upon any territorial jurisdiction of the State over the high seas. The following extract from the decision seems to make the above contention clear:

"We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. Being valid, it created an obligatio, a personal liability of the owner of the Hamilton to the claimants. Stater *vs.* Mexican National R. R. Co., 194 U. S. 120, 126. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. Ex parte Niel, 13 Wall. 236, 243. It might not give a proceeding in rem, since the statute does not purport to create a lien. It might give a proceeding in personam. The Corsair, 145 U. S. 335, 347. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit. But we are not concerned with these considerations. In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle . . . but is the result of the statute, which provides for, as well as limits the liability, and allows it to be proved against the fund."

The Hamilton, 207 U. S. 398, 404.

See also the able discussion of the above decision by George Whitelock, Esquire, in 22 Harvard Law Review, page 403, particularly the discussion upon page 413:

"It is now settled by the Hamilton and La Bourgogne cases, that if the owner of an offending ship surrenders the remains of his property with freight pending in order to limit his liability, persons entitled to an action by reason of the death of their decedent under the law of the ship's flag or domicile, will be allowed, upon being brought into court, to participate in the distribution of the fund. But on the other hand it has not

yet been determined by the Supreme Court in a case of death on the high seas, that a lien created upon the ship itself by a statute of one of the American States will be enforced in admiralty, nor has it been expressly decided by that court that an action in personam will lie in the admiralty under a statute of the state of the ship's domicile."

No decision could more plainly establish the right of Congress to legislate for United States vessels upon the high seas, or explain more clearly the effect given in the admiralty jurisdiction in certain cases to laws of other jurisdictions.

That the admiralty does not recognize any right of a State or sovereignty to legislate for the vessels of its citizens as if they were its own territory is shown by the following decision.

La Bourgogne, 210 U. S. 95.

This case last cited was a case of collision upon the high seas between a French vessel and a British vessel and the rules to be applied in determining who was at fault in the case of such a collision were stated as follows:

"If a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *prima facie*, determine them by its own law, as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws."

La Bourgogne, 210 U. S. 95, 115.

If the admiralty recognized that each state had jurisdiction over the vessels of its own citizens as parts of its own territory, then it is apparent that in the case of a collision between vessels of different nationalities every person responsible for the collision would be answerable for its effects according to the law of one or the other of the two ships in collision, depending upon

whether the events raising liability were considered to take place upon one vessel or the other.

United States *vs.* Davis, 2 Sumner, 482.
The Queen *vs.* Keyn, L. R. 2, Ex. Div. 63, 66, 98 101–107, 148, 149, 150, 158, 232–238.

The established principle that the law of the United States will govern in civil cases of collision upon the high seas between vessels of different foreign nationalities shows that the admiralty jurisdiction is not subject to the law of the state of the owner of the vessel.

II. The Importance of the Above Distinction in Determining whether to Give to an Unconstitutional Statute a Partial Enforcement, Based upon the First or Second Kind of Jurisdiction.

The ease of defining a jurisdiction dependent upon locality such as the admiralty or maritime jurisdiction as compared with the difficulty of determining the extent of a jurisdiction dependent upon subject matter, such as the right to regulate inter-state commerce, will hardly be denied. The ordinary citizen, knowing that a law applies to the High Seas and not elsewhere, can tell whether he is subject to the law, whereas if it should be a question of a law which applies only to inter-state commerce it may be a matter of the greatest difficulty for any person to decide whether he is in such a situation that the law is applicable to him. Therefore, those decisions which hold that a statute by its terms applying to the entire land and wholly unconstitutional unless given a partial enforcement as a regulation of inter-state commerce, will not be given such partial enforcement, have no application to the present case. The reason for those decisions is the great difficulty in separating inter-state from intra-state commerce and the confusion oftentimes likely to result from having one law for inter-state commerce and another law for intra-state commerce, both carried on, it may be, in the same place and with the same instrumentalities. There must always be a doubt as to whether Congress in passing a law in terms applicable to the entire country, but held to be unconstitutional except so far as applicable to inter-state commerce, desired to give rise to the difficulty and confusion which might result within the States from the partial application of the Statute.

These objections, however, do not exist in the case of a partial application based upon locality; that is to say, giving the Statute effect in the District of Columbia, in the territories and upon the high seas and navigable waters of the United States, but not elsewhere.

The essential similarity of the jurisdiction of Congress over the high seas and the jurisdiction of Congress over the territory of the United States was recognized by Justice Story in commenting upon the "Act More Effectually to Provide for the punishment of certain crimes against the United States and for other purposes," approved March 3, 1825 (ch. 65, 4 Stat. 115). Mr. Justice Story said:—"The state courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction."

Cited in

United States *vs.* Press Publishing Company, 219 U. S. 1, at page 12.

The reference by Mr. Justice Story to batteries shows that he was speaking of the general admiralty criminal jurisdiction of Congress and not of the power to define and punish piracies and felonies under Article 1, Section 8, of the Constitution "It is under this grant alone (the extension of the judicial power to all cases of admiralty and maritime jurisdiction) that the federal government has the right to punish a large class of offences, whose punishment was provided for in the acts of Congress in relation to crimes and offences on the high seas."

Benedict, Admiralty, 4th Edition, § 599.
United States *vs.* Wilson, 3 Blatch. 435.

III. THE APPLICATION OF THE STATUTE TO ENROLLED VESSELS OF THE UNITED STATES UPON THE HIGH SEAS, TO THE DISTRICT OF COLUMBIA AND THE TERRITORIES IS SEPARABLE FROM THE OTHER APPLICATIONS OF THE STATUTE.

This case was decided in the Court below shortly after the decisions in the Employers' Liability cases in which the first Employers' Liability Act was held to be unconstitutional in

its application within the States of the Union, even in a case for which upon its facts Congress might have made the principles of the law govern. Since the decision in the Court below, however, it has been held that that same statute is of full force and effect in the territories of the United States.

El. Paso & Northeastern Railway Company *vs.* Gutierrez, Administratrix, 215 U. S. 87.

This recent decision establishes the fact that a law unconstitutional within the states, because while founded upon the right to regulate inter-state commerce, it includes other than inter-state and foreign commerce within its operation, may still be of full force and validity in those places within which Congress has plenary jurisdiction.

This is substantially the question which was left open by this Court in the Civil Rights Cases upon which the defendant in error relies to prevent the enforcement of this law. In the Civil Rights Cases Mr. Justice Bradley said,

"We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us; they all being cases arising within the limits of States."

Civil Rights Cases, 109 U. S. 3, 19.

And again by the same justice it was said in the same case, "it must necessarily be declared void, at least so far as its operation in the several States is concerned."

Civil Rights Cases, 109 U. S. 3, 25.

IV. The Application of this Statute to those Places within the Plenary Jurisdiction of Congress is in Accordance with the Intention of Congress.

There may be possible rules of law which Congress would not desire to be operative unless they could have effect throughout the United States, and apply to all persons alike. A tax law for general Federal purposes or a law regulating bills of exchange might be such a law. But the Civil Rights Act was a statute passed with the benevolent purpose of alleviating

the condition of the recently enfranchised slaves. It was a law for the personal benefit and protection of individuals, an attempt to lift them up as far as possible to the plane of other citizens. It was a law of personal rights and the failure of such a law to extend throughout the Union, while regrettable, would give no reason for not having such a law in force wherever Congress could legally enact it. The statute is in the nature of a law, affecting status or legal capacity, upon which subject the law of different jurisdictions has always varied greatly. There was no more reason for Congress to be unwilling to make law the principles of this act for the reason that Congress could not make the entire act effective throughout the United States than there would have been for Congress refusing to pass the act freeing the slaves in the District of Columbia (Act of April 16, 1862, 37th Congress, 2nd Session, Chap. LIV.) for the reason that Congress had no power to pass such an act freeing the slaves throughout the United States.

That Congress intended the Civil Rights Act to have a partial application so far as it was constitutional is shown by the case of

Ex parte Virginia, 100 U. S. 339,

in which the fourth section of the statute was permitted to be enforced in a criminal case.

Respectfully submitted,

ALBIN L. RICHARDS,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1912.

MARY F. BUTTS, PLAINTIFF IN ERROR,

v.

MERCHANTS AND MINERS TRANSPORTATION COMPANY.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the District Court of the United States for the District of Massachusetts sustaining defendant's demurrer to the plaintiff's declaration, in an action in which the plaintiff seeks to recover twelve penalties of five hundred dollars each under Sections 1 and 2 of Chapter 114 of the Act of Congress of March 1, 1875 (18 Stat. 335).

Plaintiff alleges that she is a colored person and a citizen of the United States; and that the defendant is a common carrier of passengers by water between the port of Boston in the Commonwealth of Massachusetts and the port of Norfolk in the Commonwealth of Virginia; that on June 29, 1907, she purchased a ticket from the defendant entitling her to a first class passage from said Boston to said Norfolk, and a return passage from said Norfolk to said Boston; that she made the passage from said Boston to said Norfolk on the steamship Juniata, sailing from

Boston on June 29, 1907, and the passage back from Norfolk to Boston on the steamship Howard, sailing from Norfolk on August 28, 1907, both steamships being owned and operated by the defendant. She alleges in substance that during said voyages she was discriminated against because of her color, and that the defendant deprived her of certain accommodations, advantages, facilities, and privileges, included in her ticket and paid for by her, in violation of the provisions of Sections 1 and 2 of the statute above referred to (p. 3).

The defendant demurred to the plaintiff's declaration (p. 11).

The Court below sustained the demurrer and ordered judgment for the defendant (pp. 12, 13, 14); and plaintiff sued out this writ of error to review this judgment.

Sections 1 and 2 of Chapter 114 of the Act of Congress of March 1, 1875, on which the action is founded, are as follows:

> "SECT. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
>
> SECT. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more

than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year; Provided, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State; And provided, further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

ARGUMENT.

I.

The two sections of the statute now under consideration were before the Supreme Court of the United States in what are known as the Civil Rights Cases, 109 U.S. 3; and they were declared unconstitutional and void, at least so far as their operation in the several States is concerned, and that they were not conceived with the view of regulating rights in public conveyances passing from one State to another. It was said in the course of the opinion in these cases, at page 19:

> "We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal legislation. Whether the law would be a valid one as applied to the Territories and the District, is not a question for consideration in the cases before us; they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to

another, is also a question which is not now before us, as the sections in question are not conceived in any such view."

One of the cases decided in the Civil Rights Cases was Richard A. Robinson *et ux. v.* Memphis & Charleston Railroad Company, an action brought in the Circuit Court of the United States for the Western District of Tennessee to recover a penalty of five hundred dollars under the second section of said statute, the principal breach of the statute relied upon being the refusal by the conductor of the Railroad Company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The defendant in this case was an interstate road and the plaintiffs were citizens of Mississippi and were traveling on tickets purchased by them of the Railroad Company and entitling them to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. The case was tried on the assumption by both parties of the validity of the statute. The jury returned a verdict for the defendant upon the merits under a charge of the Court to which a bill of exceptions was taken by the plaintiffs. The principal point made by the bill of exceptions was the wrongful admission of testimony prejudicial to the plaintiffs. And the case was brought to this Court on a writ of error sued out by the plaintiffs. This Court did not decide the case upon the exceptions, but went back of the exceptions to the very foundation of the plaintiff's action, and declared that the statute was unconstitutional in so far as its operation in the several States was concerned, and that it was not conceived with a view of regulating interstate traffic; deciding, in effect, that even if the plaintiffs' exceptions were well taken, the plaintiffs had no cause of action anyway. An unsuccessful effort was made to convince the Court that these sections of the statute should be sustained as a regulation of interstate commerce. That this point was fully argued and considered will appear from the

plaintiffs' brief and from the comments of Mr. Justice Harlan at page 60 in his dissenting opinion on this aspect of the case.

The case at bar is on all fours with the Robinson case. It cannot be distinguished. In both cases the plaintiffs were interstate passengers and the defendants common carriers engaged in interstate commerce, and if the statute in question was intended as a regulation of interstate commerce, it would be as applicable to one case as to the other. It appears that the vital points raised by the plaintiff in the case at bar were raised, considered and decided contrary to her contention in the Robinson case. The plaintiff in the case at bar, therefore, is met at the very beginning of her case with the principle of *stare decisis* from which there appears to be no escape.

Citation of authorities is unnecessary to support the contention that *stare decisis* prevails in the interpretation of statutes as in other departments of the law and that a single decision should be followed unless clearly wrong. It can hardly be held that the decision in the Robinson case is clearly wrong, as the opinion in the Civil Rights Cases was passed down October 15, 1883, and since that time it has withstood the scrutiny of both Congress and the Bar without action on the part of either to amend the statute or to have the question reviewed by this Court. In fact an examination of the Federal Reporter Digests does not disclose a single action brought under these sections of the statute since that time.

II.

But, conceding for the sake of the argument, that it was not decided in the Civil Rights Cases that these sections of the statute do not apply to regulating rights in public conveyances while engaged in interstate commerce, and that this is still an open question, how stands the plaintiff's case? The phraseology of the two sections of the statute and the opinion of the Court in the

Civil Rights Cases show conclusively that Congress in passing this statute acted upon the assumption that Congress had plenary power to legislate on the subjects embraced in these sections for the whole country. But Congress had no such authority.

The question then presented is whether these sections of the statute which were intended to apply to the whole country, and which the Court has held to be unconstitutional so far as they apply to the States, can be limited by judicial construction to apply only to the Territories, the District of Columbia and public conveyances passing from one State to another. It is true that a statute may be declared unconstitutional in part and the balance remain valid, but this is only where the valid portion of the statute is clearly separable from the invalid, and it is plain that the legislative body would have enacted the one without the other.

It is clearly impossible in the sections under consideration to separate that which has been declared unconstitutional from the remaining portions, if, indeed, there are any remaining portions, because if you strike out the invalid part there is not enough of the sections remaining, without making material additions thereto, to apply to any particular sections of the country, much less to conveyances passing from one State to another. Moreover, the Court observed in the Civil Rights Cases that these sections were not conceived with a view to regulating rights in public conveyances passing from one State to another, therefore, to make these sections applicable to the case at bar it would be necessary to read into what remains of these sections, after eliminating the unconstitutional part thereof, the words necessary to adapt them to a purpose for which they were not originally intended. This would be creating a new law rather than construing an old statute.

But this question in all its aspects has been so thoroughly considered and fully covered by the opinion of this Court on similar statutes as to leave no room for argument.

The case of United States *v.* Reese, 92 U.S. 214, was an indictment based upon the Act of Congress of May 31, 1870 (16 Stat. at L. 140, Chap. 114), for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election, but the Court was of the opinion that as regarding the section of the statute under consideration Congress could only punish such denial when it was on account of race, color, or previous condition of servitude. It was urged in this case that the general description of the offence included the more limited one and that the section was valid where such was in fact the cause of denial, but the Court said (p. 221):

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For the purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific when, as expressed, it is general only.
>
> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.

> This would, to some extent, substitute the judicial for the legislative department of the Government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

And in the Trade-Mark Cases, 100 U.S. 82, the validity of an indictment to punish the counterfeiting of trade-marks was considered (19 Stat. at L. 141, Chap. 274). The congressional enactments at that time attempted to authorize trade-marks generally, and the statute referred to was equally general. It was held that under the Constitution Congress did not have control over the subject of trade-marks generally, and, referring to the contention that to a limited extent it had, the Court said (p. 98):

> "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. . . . While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the Court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in United States *v.* Reese, 92 U.S. 214. . . . If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under

State law. Cooley, Const. Lim., 178, 179; Com. *v.* Hitchings, 5 Gray, 482."

Again in James *v.* Bowman, 190 U.S. 127, the validity of an indictment under Sect. 5507, U.S. Rev. Stat., to punish bribery at elections was considered, and after citing the cases above cited and others, the Court said (p. 142):

> "We deem it unnecessary to add anything to the view expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offences when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offence which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is disobeyed; and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

And more recently in the Employers' Liability Cases, 207 U.S. 463, the Court said (p. 501):

> "Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of the act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this

applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois C.R. Co. *v.* McKendree, 203 U.S. 514, and authorities there cited.

As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate."

These cases are precisely in point and on principle cannot be distinguished from the case at bar and are decisive of it.

It appears from the foregoing citations, that where a statute contains both constitutional and unconstitutional provisions, in order to give effect to the constitutional provisions it is necessary not only that the constitutional provisions be separable from and not dependent upon the unconstitutional provisions, but it must also be plain that the legislative body would have enacted the statute with the unconstitutional provisions eliminated. It is respectfully urged that this condition is not present in the case at bar. There is nothing in the statute itself, or in its preamble, that indicates Congress was intent upon regulating interstate commerce, but on the contrary it does appear, as was decided in the Civil Rights Cases, that Congress had exceeded its powers. It is

probably true that Congress intended the act to apply to all places within the United States, but that falls far short of establishing that Congress would have passed the act had it appreciated that the application of the sections under consideration would be restricted to so small a compass as the Territories, the District of Columbia and public conveyances passing from one State to another. Moreover, the Civil Rights Cases, in which this Court announced that these sections of the statute were not conceived with a view of regulating rights in public conveyances passing from one State to another, was passed down October 15, 1883, and since that time Congress has taken no action in reference to amending the sections in question. This inaction on the part of Congress would seem to indicate that Congress was content to leave the matter where the Court had left it.

And even if it can be held that it is plain that Congress would have enacted these sections of the Civil Rights Act as applying to the Territories and the District of Columbia, it cannot be said to be equally plain that Congress would have enacted these sections as applying to vessels on the high seas engaged in interstate commerce, for the reasons stated in his opinion by the learned Judge below (Rec., pp. 14 and 15):

> "For while the Territories and the District 'are subject to the plenary legislation of Congress in every branch of municipal regulation' (109 U.S. 19) a vessel of the United States on the high seas, being considered, for some purposes at least, as part of the State whereof her owner is a citizen, is subject, where Congress has not acted, to the legislation of that State in regard to the duties and liabilities of her owner. The Hamilton, 207 U.S. 398. If, as was decided in the Civil Rights Cases, the Fourteenth Amendment does not authorize direct legislation by Congress on the matters respecting which it prohibits the States from certain legislation or certain action, — but corrective legislation only, such as may be necessary or proper

to counteract and redress the effect of forbidden State legislation or action, — it is, as it seems to me, the less easy to conclude that Congress would have enacted direct legislation to apply where State legislation was in force, than that it would have enacted such legislation to apply in places subject to no legislation but its own."

III.

In conclusion, it is respectfully submitted that the judgment of the Court below was correct and it should be affirmed.

A. N. WILLIAMS,
For Defendant.

BUTTS *v.* MERCHANTS & MINERS TRANSPORTATION CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 131. Argued January 21, 1913.—Decided June 16, 1913.

Where the greater part of a statute is unconstitutional as beyond the power of Congress, the question for the court to determine as to the part which is constitutional is whether it was the intent of Congress to have that part stand by itself—if not, the whole statute falls.

This court holds that it was the evident intent of Congress in enacting the Civil Rights Act to provide for its uniform operation in all places in the States as well as the Territories within the jurisdiction of the United States, and that it was not the intent of Congress that the provisions of the statute should be applicable only to such places

as are under the exclusive jurisdiction of the National Government.

The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, *Civil Rights Cases*, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. *The Trade Mark Cases*, 100 U. S. 82.

The enforcement of a remedial statute, such as the Employers' Liability Act, in Territories of the United States, although unconstitutional as to the States, is distinguishable from the similar enforcement of a highly penal statute such as the Civil Rights Act. *El Paso &c. Railway Co.* v. *Gutierrez*, 215 U. S. 87, distinguished.

THE facts, which involve the constitutionality of §§ 1 and 2 of the Civil Rights Act of March 1, 1875, as applied to vessels of the United States engaged in the coastwise trade, are stated in the opinion.

Mr. Albin L. Richards for plaintiff in error:

Congress has two kinds of jurisdiction, that dependent upon locality and that dependent upon subject-matter. The first includes jurisdiction over vessels of the United States upon the high seas and the navigable waters of the United States.

The admiralty and maritime jurisdiction of Congress is not dependent solely upon the power of regulating commerce, *United States* v. *Burlington & Henderson Ferry*, 21 Fed. Rep. 331, 341, but also on the grant extending the judicial power to all cases of admiralty and maritime jurisdiction in Art. III, § 2 of the Constitution. *The Hamilton*, 207 U. S. 398.

Fixing the limits of admiralty and maritime jurisdiction is simply establishing a physical boundary. See *Gibbons* v. *Ogden*, 9 Wheat. 1; *Waring* v. *Clarke*, 5 How. 441, 465; *The Genesee Chief*, 12 How. 443; *Gilman* v. *Philadelphia*, 3 Wall. 724; *The Belfast*, 7 Wall. 624; *The Daniel Ball*, 10 Wall. 557; *Ex parte Easton*, 95 U. S. 68; *In re Garnett*, 141 U. S. 1; *The Robert W. Parsons*, 191 U. S. 17.

For the distinction between acts regulating interstate commerce upon land and the jurisdiction of Congress over navigable waters, see *The Daniel Ball*, 10 Wall. 557, 565; *Ex parte Easton*, 95 U. S. 68, 72; *The Robert W. Parsons*, 191 U. S. 17.

The sovereignty of Congress over United States vessels upon the high seas is in nowise impaired by the fact that within that jurisdiction for some purposes, the laws of the individual States are given effect. *The Hamilton*, 207 U. S. 398, distinguished. See article by George Whitelock, 22 Harv. Law Rev., pp. 403, 413.

That admiralty does not recognize any right of a State or sovereignty to legislate for the vessels of its citizens as if they were its own territory is shown by the *Bourgogne Case*, 210 U. S. 95, 115. See also *United States* v. *Davis*, 2 Sumner, 482; *The Queen* v. *Keyn*, L. R. 2 Ex. Div. 63, 66, 98, 101, 107, 148, 149, 150, 158, 232, 238.

The established principle that the law of the United States will govern in civil cases of collision upon the high seas between vessels of different foreign nationalities shows that the admiralty jurisdiction is not subject to the law of the State of the owner of the vessel.

The above distinction is important in determining whether to give to an unconstitutional statute a partial enforcement, based upon the first or second kind of jurisdiction.

While there must always be a doubt as to whether Congress in passing a law in terms applicable to the entire country, but held to be unconstitutional except so far as applicable to interstate commerce, desired to give rise to the difficulty and confusion which might result within the States from the partial application of the statute, these objections do not exist in the case of a partial application based upon locality; that is to say, giving the statute effect in the District of Columbia, in the Territories and

upon the high seas and navigable waters of the United States, but not elsewhere. See act to more effectually provide for the punishment of crimes, of March 3, 1825, and comments of Mr. Justice Story cited in *United States* v. *Press Publishing Co.*, 219 U. S. 1, 12. And see also Benedict, Admiralty, 4th ed, § 599; *United States* v. *Wilson*, 3 Blatchf. 435.

The application of the statute to enrolled vessels of the United States upon the high seas, to the District of Columbia and the Territories is separable from the other applications of the statute.

El Paso & N. E. Ry. Co. v. *Gutierrez*, 215 U. S. 87, holding provisions of Employers' Liability Act separable as to Federal jurisdiction, decided substantially the question which was left open by this court in the *Civil Rights Cases* upon which the defendant in error relies to prevent the enforcement of this law. *Civil Rights Cases*, 109 U. S. 3, 19, 25.

The application of this statute to those places within the plenary jurisdiction of Congress is in accordance with the intention of Congress.

The Civil Rights Act was a statute passed with the benevolent purpose of alleviating the condition of the recently enfranchised slaves. It was a law for the personal benefit and protection of individuals, an attempt to lift them up as far as possible to the plane of other citizens. It was a law of personal rights and the failure of such a law to extend throughout the Union, while regrettable, would give no reason for not having such a law in force wherever Congress could legally enact it.

Congress intended the Civil Rights Act to have a partial application so far as it was constitutional. See *Ex parte Virginia*, 100 U. S. 339, in which the fourth section of the statute was permitted to be enforced in a criminal case.

Mr. A. Nathan Williams for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an action to recover twelve penalties of $500 each under §§ 1 and 2 of the act of March 1, 1875, 18 Stat. 335, c. 114, known as the Civil Rights Act. According to the declaration the facts are these: The plaintiff is a colored woman and a citizen of the United States, and the defendant is a Maryland corporation engaged in the transportation of passengers and freight by vessels plying between Boston, Massachusetts, and Norfolk, Virginia. Upon tickets purchased for the purpose and entitling her to the accommodations and privileges of a first class passenger, the plaintiff was carried by the defendant on one of its steamships from Boston to Norfolk and on another back to Boston. Both vessels were engaged in the coastwise trade as public conveyances, and were duly enrolled under the laws of the United States. During both voyages the plaintiff was denied, because of her color, the full and equal enjoyment of the accommodations and privileges of a first class passenger, the denials consisting in requiring her to take her meals at a second table, instead of at the first with the white passengers having tickets like her own, and in giving her a stateroom on the lower deck, instead of on the upper one where the white passengers possessing like tickets were given rooms. The acts of discrimination were twelve in number. Eleven were charged as occurring upon the high seas more than a marine league from any land, and the other as occurring merely upon the high seas. There was no attempt to set up a common law right of recovery, the sole reliance being upon §§ 1 and 2 of the act of 1875, *supra*. The defendant demurred, claiming that those sections are unconstitutional and void, and the demurrer was sustained, judgment being given for the defendant. The plaintiff then sued out this direct writ of error.

The preamble of the act and the sections under which the penalties are claimed are as follows:

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided,* That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by state statutes; and having so elected to pro-

ceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

The question of the constitutional validity of those sections came before this court in *Civil Rights Cases*, 109 U. S. 3, and upon full consideration it was held (a) that they receive no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power, and (b) that as applied to the States they are unconstitutional and void because in excess of the power conferred upon Congress and an encroachment upon the powers reserved to the States respectively. That decision has stood unchallenged for almost thirty years and counsel for the plaintiff does not question it now. But he does contend that, although unconstitutional and void in their application to the States, the sections are valid and effective in all other places within the jurisdiction of the United States, such as upon an American vessel upon the high seas, more than a marine league from land, and in the District of Columbia and the Territories. And in this connection our attention is directed to that part of the opinion in *Civil Rights Cases* which says (p. 19):

"We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consider-

ation in the cases before us; they all being cases arising within the limits of States."

The real question is, whether the sections in question, being in part—by far the greater part—in excess of the power of Congress, are invalid in their entirety. Their words, as also those of the preamble, show that Congress proceeded upon the assumption that it could legislate, and was legislating, in respect of all persons and all places "within the jurisdiction of the United States." It recognized no occasion for any exception and made none. Its manifest purpose was to enact a law which would have an uniform operation wherever the jurisdiction of the United States extended. But the assumption was erroneous, and for that reason the purpose failed. Only by reason of the general words indicative of the intended uniformity can it be said that there was a purpose to embrace American vessels upon the high seas, the District of Columbia and the Territories. But how can the manifest purpose to establish an uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction? How can the use of general terms denoting an intention to enact a law which should be applicable alike in all places within that jurisdiction be said to indicate a purpose to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part? Besides, it is not to be forgotten that the intended law is both penal and criminal. Every act of discrimination within its terms is made an offense and misdemeanor, and for every such offense it gives to the aggrieved party a right to a penalty of $500 and subjects the offender to a fine of not less than $500 nor more than $1,000, or to imprisonment for not less than thirty days nor more than one year.

The decision of this court in *United States* v. *Reese*, 92 U. S. 214, is well in point. That was a prosecution

under a congressional enactment punishing election officers for refusing to any person entitled to do so the right to cast his vote. The statute was expressed in general terms embracing some acts which Congress could condemn and others which it could not. As to the latter it was, of course, invalid, and the claim was made that, as the act charged was not of the latter class but of the former, the statute should be sustained as to acts like the one charged, notwithstanding the general terms were in excess of the power of Congress. But the court held otherwise, saying:

(p. 219) "This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *United States* v. *Wiltberger*, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

(p. 221) "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be de-

termined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

So here, to give to the sections in question the effect suggested it would be necessary to reject or strike out the general words "within the jurisdiction of the United States," whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words restricting their operation to American vessels upon the high seas and to the District of Columbia and the Territories. To do this would be to introduce a limitation where Congress intended none and thereby to make a new penal statute, which, of course, we may not do.

Another decision no less in point is *Trade Mark Cases*, 100 U. S. 82, which related to an act of Congress providing generally for punishing the fraudulent use of registered trade-marks, although the power of Congress in that regard extended only to trade-marks used in commerce

with foreign nations, or among the several States or with the Indian tribes. In pronouncing the statute invalid in its entirety the court said:

(p. 96) "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.

(p. 98) "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: . . . Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

(p. 99) "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law."

The two cases from which we have quoted have been often followed and applied. *United States* v. *Harris*, 106 U. S. 629, 641; *Baldwin* v. *Franks*, 120 U. S. 678, 685;

James v. *Bowman*, 190 U. S. 127, 140; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Central Railroad Co.* v. *McKendree*, 203 U. S. 514, 529–530; *Karem* v. *United States*, 121 Fed. Rep. 250, 259.

Counsel for the plaintiff cites *El Paso & Northeastern Railway Co.* v. *Gutierrez*, 215 U. S. 87, as an authority for holding the sections in question valid as applied to American vessels upon the high seas and to the District of Columbia and the Territories, notwithstanding their invalidity as applied to the States. The matter involved in that case was whether the provision in the Employers' Liability Act of 1906, 34 Stat. 232, c. 3073, relating to the District of Columbia and the Territories could be sustained, considering that the provision relating to interstate commerce had been adjudged invalid in *Employers' Liability Cases*, 207 U. S. 463. That act was quite unlike the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. Its applicability to the District of Columbia and the Territories did not depend upon the same words which made it applicable to interstate commerce. On the contrary, it dealt expressly, first, with common carriers "in the District of Columbia, or in any Territory of the United States," and, second, with common carriers "between the several States." The latter provision had been adjudged invalid because too broad in some of its features, and the *Gutierrez Case* involved the other provision. In that case the court, considering the terms of the statute, held that the provision relating to interstate commerce was "entirely separable from" the one relating to the District of Columbia and the Territories, and that Congress manifestly had proceeded "with the intention to regulate the matter in the District and the Territories, irrespective of the interstate commerce feature of the act." With the

invalid and separable provision eliminated, there still remained a complete and operative statute in terms applying to the District of Columbia and the Territories. The differences between that act and the sections now before us are so pronounced and so obvious that the *Gutierrez Case* is not an authority for the plaintiff. On the contrary, it is in entire harmony with the other cases before cited, as is shown throughout the opinion and by the following excerpt (p. 97):

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514; *Employers' Liability Cases*, 207 U. S. *supra*."

Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, "within the jurisdiction of the United States," which alone indicate where the sections are to be operative. Those words, as the context and the preamble show, were purposely used. They express the legislative will and cannot be limited in the manner suggested without altering the purpose with which the two sections were enacted. They must therefore be adjudged altogether invalid. *James* v. *Bowman* and *United States* v. *Ju Toy*, *supra*; *Poindexter* v. *Greenhow*, 114 U. S. 270, 305.

Judgment affirmed.